No. 84-70

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DANIEL B. CROWDER, etc., et al.,
Petitioners,

v.

E. JEAN ORR,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF RESPONDENT IN OPPOSITION

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For the reasons stated herein, respondent believes that petitioners' request for a writ of certiorari should be denied.

COUNTER-STATEMENT OF THE CASE

The facts of this case are as stated in the decision of the Supreme Court of West Virginia. Petition App. A at 9-10; 24-33; 40-43. Petitioners' statement of facts departs significantly from that version and to this extent is not a reliable indicator of the state of the record.

SUMMARY OF ARGUMENT

Petitioners assert two questions in connection with the First Amendment claim. First, they contend that the holding that the criticism of the proposed plan for the new library facility constituted a matter of public concern conflicts with this Court's decision in *Connick v. Myers*, —— U.S. ——, 103 S.Ct. 1684 (1983). Unlike

Connick, however, the comments at issue were in no sense a personal grievance regarding working conditions, and respondent was not complaining about inconvenience to herself, but was seeking to protect the interests of the public; there simply is no conflict here. Second, petitioners question whether persistent efforts to obtain retroactive faculty status constitute a matter of public concern. However, this issue is not presented by this case, as the Court below did not decide it or even discuss it.

In their third "question presented" petitioners contend that they were denied due process of law because the court below overruled prior precedent on which they relied. The court below ruled that it was *not* overruling prior precedent, and this Court could reach petitioners' third question only by overturning the West Virginia Supreme Court's construction of state law. Moreover, even were this Court to undertake its own determination of the meaning of prior West Virginia law and even were it to conclude that the lower court misconstrued its own law, there still would not be a due process violation in these circumstances. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 680, 682 n.8 (1930).

Finally, petitioners' contention that the West Virginia Supreme Court erred in applying its "two issue" rule to a federal cause of action—because that rule is "outcome determinative in a systematic manner"—is wrong (assuming, as we doubt, that this would render its use improper). Petitioners could have obtained the same result as would follow from the federal rule regarding general jury verdicts simply by requesting a special verdict. Because that is what defendants in states applying the "two issue" rule do routinely, petitioners can not cite a single case in which the propriety of applying the "two-issue" rule to federal claims brought in state courts has ever been addressed. The question thus is of no practical significance.

ARGUMENT

1. Petitioners first "question presented" is whether Orr's criticism of the proposed plans for a new library facility constituted protected speech on a matter of public concern. Petition at i. Petitioners contend that the West Virginia Supreme Court's holding that Orr's criticism of the library plans was a matter of public concern conflicts with this Court's decision in *Connick v. Myers*, —— U.S. ——, 103 S.Ct. 1684 (1983).

Contrary to Petitioners' argument, the holding that Orr's criticism of the proposed design for the library facility was a matter of public concern, in no way conflicts with *Connick*, and is in full accord with this Court's decisions. *Connick* involved the discharge of a public employee for circulating to her coworkers a questionnaire regarding a number of internal office matters. She did so on the heels of a proposal by one of her superiors to transfer her; she strongly opposed the transfer. This Court found that in these circumstances virtually all of the employee's speech amounted to a personal grievance over internal office policy. It held that "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, a federal court is not the appropriate forum in which to review the wisdom of a decision taken by a public agency allegedly in reaction to the employee's behavior." Although this Court upheld the discharge in *Connick*, it made clear that the balance it struck did not diminish the right of a public employee to speak out on matters of public concern. Its decision reaffirmed the principles of *Pickering v. Board of Education*, 391 U.S. 563 (1963), on this score.

In the instant case the West Virginia Supreme Court found that Orr's criticism of the library plans constituted a matter of public concern because it involved "the design of a facility to be used by the public." Petition App.

A at 84 n.10. It cited Orr's "basic criticism" of the design:

> that the library was laid out so that most of the main student traffic in travelling to and from class rooms would pass through the library. This would have disrupted the library patrons and would have provided little security for the library collection.

Petition App. A at 30. These concerns are a far cry from the personal concerns that prompted the employee's speech in *Connick*: the subject of the speech here is not the personal grievance of an employee about her working conditions, as it was in *Connick*. Orr was not complaining about inconvenience to herself, but about the interests of the public—the disruption that would result to the library's patrons and the threat to the security of the library collection.

Finally, the lower court correctly found that "the fact that Orr's criticism was voiced at faculty staff meetings and to [her superiors, did] not diminish the 'public' character [of the criticism]." *Id.* at 84 n.10. *See Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979).[1]

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[1] Petitioners contend that "the record is sufficient to conclude" that respondent was denied tenure not because of *what* she said, but because she violated "protocol" in the *manner* in which she said it. Petition at i, 31. But the holding of the court below is simply that the record is sufficient to support a jury finding that Orr was denied tenure because of *what* she said. The court below did not hold that the First Amendment would have precluded adverse action had the action been taken because of a violation of protocol. Accordingly, that question is not presented here.

For the same reason, petitioners are wrong in suggesting that this case presents a vehicle to clarify whether adverse actions by an employer motivated by criticism, but based on legitimate factors other than the content of the criticism, are permissible. Petition at 31. This is a case in which it has been found that the employee suffered adverse action because of the *content* of the criticism, not factors other than that content. Petition App. A at 84 n. 10; 30; 41; 42; 43; 87 n. 15.

2. Petitioners' second "question presented" asks whether Orr's "persistent efforts to convince her superiors that she ought to be granted retroactive faculty-status constituted speech relating to a matter of public concern so as to be an impermissible basis on which to terminate her employment, where such termination was based in part on a continuing pattern of unresponsiveness to her superiors. . . ." Petition at i-ii. That question, however, is not presented in this case. The West Virginia Supreme Court did not hold that "persistent efforts to convince . . . superiors [to grant] retroactive faculty-status" are an impermissible basis on which to terminate employment. It held only that Orr's criticism of the library plans was an impermissible basis. Indeed, the West Virginia Supreme Court understood the criticism of library plans to be the only First Amendment claim that had been submitted to the jury (Petition App. A at 9); and petitioners' *own* briefs to that court identified the library plans criticism as the only First Amendment claim considered by the jury.[2]

3. In their third "question presented" petitioners allege that the court below denied them due process of law because it "*sua sponte* overrul[ed] state procedural law and retroactively appli[ed] a requirement that trial counsel must request a separate verdict on each count . . . where . . . counsel, relying on the law in effect at the time of trial, did not so request and would have prevailed on appeal but for the retroactive application of the new rule." Petition at ii-iii. They argue that this Court should intervene because "[r]etroactive application of the

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[2] The court cited Orr's request for retroactive faculty status only for the light it shed on petitioners' state of mind respecting Orr's criticism of the library plans. The court found it significant, for example, that the first written notice Orr received regarding her request came shortly after a meeting where she criticized the plans and that, while petitioners gave retroactive faculty status to two other librarians in December 1975, they withheld their decision on her status. Petition App. A at 42-43.

'two-issue' rule deprived them of property without due process of law, was contrary to *Brinckerhoff(sic.)-Faris Trust and Sav. Co. v. Hill*, 281 U.S. 673 (1930), and was . . . arbitrary." *Id.* at 38.

The West Virginia Supreme Court did not consider its decision on the "two issue" rule in this case to be a departure from prior law—("adoption of the rule permiting a general verdict to be sustained if supported by one good theory is not inconsistent with . . . prior law," Petition App. A at 50)—and the dissent below did not dispute the decision in this regard. Nevertheless, petitioners dispute that reading of West Virginia law, and that dispute is the predicate for the federal claim presented in their third "question presented". Whatever the merit of this dispute, however, a state court's construction of prior state law is not an appropriate subject for this Court's review. Yet only by overturning the state supreme court's construction of prior state law could this Court even reach the question that petitioners present.

Even were this Court to undertake an independent construction of prior West Virginia law, and even were it to disagree with the West Virginia Supreme Court about the meaning of prior West Virginia law, the third "question presented" would be frivolous. *Brinkerhoff-Faris*, upon which petitioners place their principal reliance, held *only* that the state courts cannot deny a litigant "due process in the primary sense"—"an opportunity to present its case and be heard in its support." 281 U.S. at 681. In that case the plaintiff sued to obtain an injunction against the collection of an allegedly discriminatory tax assessment. The state supreme court—without ruling on the plaintiff's discrimination claim—affirmed the dismissal of plaintiff's request on the ground that the plaintiff had an adequate legal remedy with the state tax commission. Prior to this ruling, however, that same court had held unequivocally that the state tax commission had no power to grant the relief plaintiff

sought, and the plaintiff, therefore, could not initially have pursued this option. By the time the supreme court reversed its prior holding, the plaintiff was time-barred from doing so. Thus, "[t]he state court refused to hear the plaintiff's complaint and denied it relief, not because of lack of power or because of any demerit in the complaint, but because . . . the plaintiff did not first seek an administrative remedy which, in fact was never available and which is not now open to it." 281 U.S. at 679. The only due process violation found in *Brinkerhoff-Faris* was that the state had deprived the plaintiff of any opportunity whatever to be heard.

Contrary to petitioners' assertion, the application of the "two-issue" rule in the instant case is not contrary to *Brinkerhoff-Faris*—even on the hypothesis that the adoption of that rule departed from prior West Virginia law. Petitioners were accorded the opportunity to present their case and to be heard in the courts of West Virginia. And they were free to request at the trial that separate verdicts be entered on each claim. Had such a request been made and denied, it would have been reversible error as a matter of state law. Petitioners' only point is that they did not avail themselves of an opportunity that was available to them—because they relied on prior precedent that indicated there was no need to do so. That contention, even were it correct, would not amount to a due process violation. As *Brinkerhoff-Faris* itself expressly stated: "the courts of a state have the supreme power to interpret and declare . . . the laws of the state," 281 U.S. at 680, and

> the mere fact . . . a state has . . . overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment.

Id. *See also id.* at 682 n. 8 ("State Courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guarantees, even though the

parties may have acted to their prejudice on the faith of the earlier decisions") (citing cases). Thus, even if the West Virginia court had overruled prior law, the situation would be no different from the many instances in which this Court has overturned prior precedent and yet, although leaving room for non-retroactive application in *other* cases, has found it proper to apply the new rule to the case in which the new rule was announced. *See, e.g., Stovall v. Denno*, 388 U.S. 293, 301 (1967); *Desist v. United States*, 394 U.S. 244, 254-55 n.24 (1969).

4. Petitioners' fourth "question presented" is whether the federal rule regarding general jury verdicts "should be applied to a 42 U.S.C. § 1983 action prosecuted in state court where the contrary state rule is outcome determinative in a systematic manner." Petition at iii. But West Virginia's "two issue" rule is *not* "outcome determinative in a systematic manner"—assuming, as we doubt, that that would render its use improper. As the decision below explains, the defendant in a multiple-count case brought in the West Virginia state courts has the right upon demand to separate verdicts on each count (Petition App. A at 49). That right, when invoked, provides the defendant the same protection as the federal rule regarding general jury verdicts. Defendants in states applying the "two issue" rule routinely demand separate verdicts to assure that they will have this protection. That is why petitioners are unable to cite a single case in which the propriety of applying the "two issue" rule to federal claims brought in state court has ever been addressed. The question thus is of no practical significance.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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